No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

On Writ Of Certiorari To The Court Of Special Appeals of Maryland

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF INTEREST

The American Civil Liberties Union is a nonprofit membership organization founded to defend the personal freedoms guaranteed by the Constitution of the United States, particularly those embraced by the First Amendment. The ACLU was founded in 1920 and is made up of 50 state affiliates, some 350 local chapters, and more than 250,000 members.

The ACLU has a significant interest in the issues of this case, including (1) the continuation of special protections

* Petitioner and respondent have filed letters with the Clerk of this Court consenting to the filing of this *amicus curiae* brief.

of freedom of the press; (2) careful scrutiny of police practices effecting a prior restraint on First Amendment freedoms; and (3) concern that the governmental power of search and seizure not be utilized to impose prior restraints on free expression or suppress constitutionally protected publications.

SUMMARY OF ARGUMENT

1. When Detective Evans, without paying the purchase price, obtained possession of the magazines on whose sale Respondent's conviction rested, a seizure occurred within the contemplation of the Fourth Amendment. Since this seizure was neither authorized by a warrant nor justified by any exception to the warrant requirement, exclusion of the magazines from evidence was constitutionally mandated.

It is true, as Petitioner contends, that a police officer has the same right as any member of the public to enter a business establishment and inspect the merchandise offered there for sale. It is also true that purchase of such materials for evidentiary use in a subsequent criminal prosecution invades no reasonable expectation of privacy on the part of the merchant. Had Detective Evans, before taking any further action with respect to the Respondent, pocketed his change and his cash register receipt and taken his purchase, accompanied by a written application and appropriate affidavits, to a judicial officer for determination whether there was probable cause to believe that the publications were obscene, no Fourth Amendment question would arise.

When the detective, without Respondent's consent, retrieved the $50.00 bill he had tendered, however, he exceeded the scope of the invitation extended to the general public and, as the Court of Special Appeals of

Maryland correctly concluded, converted the transaction from a purchase to a seizure. This seizure was not authorized by a warrant nor supported by judicially determined probable cause. Under an unbroken line of this Court's authorities, the seizure of the magazines violated the Fourth and Fourteenth Amendments, and their suppression as evidence was required.

2. The same considerations that mandate a prior judicial warrant for search for and seizure of materials affected with a First Amendment interest apply with equal force to the arrest of persons suspected of violating the criminal law by reason of the possession, publication or distribution of such materials.

Respondent was convicted of selling certain magazines in violation of Maryland's obscenity statute. Not only the magazines themselves but his conduct in selling them were presumptively protected by the First Amendment. His arrest was groundlesss in the absence of probable cause to believe that the magazines were in fact obscene by legal definition. Since the legal test for obscenity is subtle and complex, and since an error in assessment poses grave risks of prior suppression of constitutionally protected expression, the determination of probable cause for arrest of a person, no less than that for search and seizure of publications, cannot be left to the unguided discretion of the arresting officer, but requires neutral and detached judicial evaluation.

That the police officers may have, according to their testimony, attempted in good faith to limit their discretion by basing their determination of probable cause on the criteria approved in prior warrants they had obtained in the course of this investigation does not purge Respondent's arrest and the seizure of the magazines of their illegality. Ratification of the officers' conduct would not

only ignore the particularity requirement of the warrant clause, but would flout the principle consistently applied by this Court, that when the Fourth Amendment requires judicial restraints, self-imposed restraints will not suffice.

The Court of Special Appeals properly concluded that the magazines should be suppressed as the fruit of an unlawful arrest.

3. Having concluded that the sole evidence presented by the State on the crucial element of the offense charged—the obscenity of the publications in question—was inadmissible, the Court of Special Appeals properly ordered the charging document dismissed. The court's decision amounted to a ruling that the trial court erred first in not excluding the magazines and then in failing to grant the defendant's motion for a judgment of acquittal, on the ground that without the excluded evidence, the prosecution had failed to prove guilt beyond a reasonable doubt.

Petitioner argues that when a reviewing court finds the essential evidence offered by the prosecution to be inadmissible, it must nevertheless remand rather than dismiss in order to give the state the opportunity to muster additional evidence if it can. This contention ignores one of the primary interests protected by the constitutional prohibition against double jeopardy: that the state should be given one full and fair opportunity—but only one—to offer whatever proof it can assemble.

ARGUMENT

I.

A Police Officer's Taking, From A Bookseller, Of Publications Alleged To Be Obscene Without Payment Of The Purchase Price Constitutes A Seizure Of Those Publications Within The Meaning Of The Fourth Amendment, And Such A Seizure, Unless Authorized By Warrant, Is *Per Se* Unreasonable.

Petitioner is of course correct in stating (Brief for Petitioner, p. 19) that a police officer, no less than any member of the public, may accept an invitation to enter business premises for the very purposes contemplated by the proprietor. *Lewis* v. *United States*, 385 U.S. 206 (1966). It is also true that the inspection and purchase of merchandise offered for sale in such establishments, even for evidentiary use in a subsequent criminal prosecution, invades no reasonable expectation of privacy in either the premises or the merchandise and hence does not constitute a "search." *United States* v. *Karo*, 468 U.S. ____, ____, 104 S.Ct. 3296, 3302 (1984); *United States* v. *Jacobsen*, 466 U.S. ____, ____, 104 S.Ct. 1652, 1656 (1984). This case would present no Fourth Amendment question had Detective Evans pocketed his change and his cash register receipt and taken his purchases, together with a written application and appropriate affidavits, to a judge of either the district or the circuit court[1] for determination whether there was probable cause to believe that the publications were obscene, and hence probable cause to arrest the Respondent for selling them.

When Detective Evans reached into the cash register and retrieved the $50.00 bill he had tendered (keeping the $38.00 change and the magazines), he was no longer acting as a mere business invitee. Instead, he substantially

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[1] Md. Code Anno., Art. 27, § 551.

interfered with Respondent's employer's possessory interest, *United States* v. *Jacobsen*, 466 U.S. at ____, 104 S.Ct. at 1656, in *either* the merchandise or the purchase money and, as the Court of Special Appeals of Maryland correctly concluded, converted what had been a lawful purchase into an illegal seizure.[2] As no appreciable time had lapsed between the officer's "purchase" of the magazines and his recapture of the money, it borders on sophistry to assert, as Petitioner does (Brief of Petitioner, p. 20) that once Respondent, on his employer's behalf, had voluntarily surrendered possession of the magazines in exchange for their purchase price, he had relinquished all interest in the merchandise, retaining an interest only in the money. Hypertechnical applications of principles of property law may not be used to defeat close scrutiny of police conduct in obtaining evidence. *Katz* v. *United States*, 389 U.S. 347, 352-53 (1967); *Warden, Md. Penitentiary* v. *Hayden*, 387 U.S. 294, 303-306 (1967).

> . . . [I]t is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. *Jones* v. *United States*, 362 U.S. 725, 734 (1960), *overruled on other grounds*, *United States* v. *Salvucci*, 448 U.S. 83 (1980).

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[2] Det. Evans's recapture of the marked $50.00 bill, a standard procedure in undercover narcotics purchases, was in this context wholly unnecessary from an evidentiary standpoint, as his testimony, supported by his cash register receipt, amply established the purchase and sale of the magazines. Narcotics dealers, unlike booksellers, do not customarily give receipts.

The Court of Special Appeals correctly looked beyond form and penetrated to the heart of the transaction, exposing the false purchase as a device calculated to evade that aspect of the warrant requirement whose specific purpose is the protection of First Amendment freedoms. *Macon* v. *State*, 57 Md. App. 705, 715-16 (1984), *quoting State* v. *Furuyama*, 64 Haw. 109, 637 P. 2d 1095, 1101 (Haw. 1981).

The definition of unprotected obscenity is complex and subtle, calling at every step of its application for careful and exacting legal distinctions. *Miller* v. *California*, 413 U.S. 15, (1973); *Roth* v. *United States*, 352 U.S. 964 (1957). "[I]t is clear that as long as the *Miller* test remains in effect 'one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.' " *Jenkins* v. *Georgia*, 418 U.S. 153, 164-65 (1974), Brennan, J., *dissenting*, *quoting Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 92 (1973), Brennan, J. *dissenting*. This Court has consistently adhered to the principle that discernment of the "finely drawn" line separating "legitimate from illegitimate" expression demands the "sensitive tools," *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), of neutral and detached judicial evaluation prior to any search or seizure of books, printed materials or films. The process demands the greatest possible particularity of description, and the most stringent limitations on police discretion. *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Heller* v. *New York*, 413 U.S. 483 (1973); *Lee Art Theatre* v. *Virginia*, 392 U.S. 636 (1968); *Stanford* v. *Texas*, 455 U.S. 971 (1965); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961).

The seizure accomplished by artifice in the present case was neither authorized by a warrant nor supported by judicially determined probable cause to believe the publications in question were obscene. Since the events of May 6, 1981, culminated a two-month investigation of established, permanently located retail stores, there can be no colorable claim of the sort of "now-or-never" exigency that might excuse judicial evaluation prior to a seizure. *Roaden* v. *Kentucky*, 413 U.S. at 505-06.

The magazines were not seized, but lawfully purchased, until the purchase money was recaptured. This event was contemporaneous with Respondent's arrest. The warrantless seizure cannot be justified as incident to the arrest, however, because, for reasons to be discussed in Argument II, the arrest itself was unlawful.

Because the magazines were seized without a warrant, and neither exigency nor lawful arrest of the Respondent excused the warrant requirement, their exclusion from evidence was required.

II.

The Arrest Of A Person Suspected Of Selling Obscene Publications, No Less Than The Search For And Seizure Of Such Publications, Requires A Prior Determination Of Probable Cause, And The Issuance Of An Arrest Warrant, By A Neutral And Detached Judicial Officer.

The same considerations that mandate a judicial warrant prior to search for and seizure of materials presumptively protected by the First Amendment apply with equal force to the arrest of persons suspected of violating criminal statutes prohibiting possession, publication, sale or distribution of obscene matter. Chief among those considerations, of course, is the fear, well grounded in history, that the government's powers of

search and seizure may be employed as a means of suppression of unpopular or objectionable ideas. *See, e.g.*, *Marcus* v. *Search Warrants*, 367 U.S., 724-29. This fear was realized in the present case, as the arrest of Respondent, the only clerk present, compelled the closing of the store, thus denying the public access to presumptively protected materials.

In a criminal prosecution, unlike a proceeding for injunction or confiscation, the publications themselves are not on trial. It is, rather, the Respondent's conduct in selling them that Petitioner seeks to sanction. See *Roth* v. *United States*, 354 U.S. at 495, Warren, C.J., *concurring in the result*. Where, as here, *scienter* is not an issue, *cf. Smith* v. *California*, 361 U.S. 147 (1959), the nature of the materials is, however, dispositive of the defendant's culpability. Respondent's arrest was groundless in the absence of probable cause to believe that the magazines were in fact obscene under the *Miller-Roth* standard.

Since, as discussed above, the legal test for obscenity is subtle and complex, and since an error in assessment poses grave risks of suppression of protected expression, the determination of probable cause for arrest of a person, no less than that for search and seizure of publications, cannot be left to the unguided discretion of the arresting officers. Only a judicial officer can focus searchingly on the question of obscenity, as the First Amendment requires. *Marcus* v. *Search Warrants*, 367 U.S. at 732.

This Court suggested as much in *Roaden* v. *Kentucky*, 413 U.S. 496, which dealt with a warrantless arrest on an obscenity charge and the seizure of a certain film incident to the arrest. 413 U.S. at 497-98. A county sheriff had watched the film and concluded that it was obscene and that he therefore had probable cause to arrest the ex-

hibitor without a warrant for a crime committed in his presence. In holding that the film should not have been admitted into evidence, this Court relied on cases holding that a police officer's unreviewed conclusion that a particular expression is obscene is unsufficient to establish probable cause for the issuance of a search warrant:

> If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, *a fortiori*, the officer may not make such a seizure with no warrant at all. 413 U.S. at 506.

The court expressly disapproved the Court of Appeals of Kentucky's reliance on the following conclusion of a three-judge panel in *Hosey* v. *City of Jackson*, 309 F.Supp. 527 (D. Miss. 1970):

> [S]eizure of an allegedly obscene film as an incident to lawful arrests for a crime committed in the presence of the arresting officers, i.e., the public showing of such film, does not exceed constitutional bounds in the absence of a prior judicial hearing on the question of its obscenity. *Quoted in* 413 U.S. at 501.

This repudiated reasoning is precisely the rule that Petitioner urges this Court to adopt in the present case.

The existence of relatively prompt post-arrest procedures for judicial determination of probable cause[3] does

[3] Under Maryland law the initial post-arrest determination of probable cause to hold a defendant to answer is made by a district court commissioner, who is usually not a lawyer. Md. Code Anno., CJ, § 2-607; Md. Rules, Rule 2-416. Only if the defendant remains incarcerated after 24 hours is he entitled to be brought before a judge, and then only for review of the conditions of pretrial release Rule 2-416(g). By contrast, a warrant for search and seizure may be issued only by a judge. Md. Code Anno., Art. 27, § 551.

not cure the affront of arrest and incarceration solely on the basis of the arresting officers' conclusion that the selling of a particular publication does not merit the constitutional protection normally accorded to the booksellers' trade. Indeed, the prospect of arrest, with its attendant disgrace, anxiety and expense, may chill the bookseller in the exercise of his First Amendment right to sell protected materials even more than the threat of seizure of his stock in trade. This is particularly true when, as in the present case, the State by design proceeds not against the owners of the business, but against the sales clerks and cashiers. The loss of liberty falls directly on the employee; the loss of inventory falls only on the enterprise.

That the police officers may have, according to their testimony, attempted in good faith to limit their discretion by basing their determination of probable cause on the criteria approved in prior warrants they had obtained in the course of this investigation does not purge Respondent's arrest and the seizure of the magazines of their illegality. Ratification of the officers' conduct would not only ignore the particularity requirement of the warrant clause, but would flout the principle consistently applied by this Court, that when the Fourth Amendment requires judicial restraints, self-imposed controls will not suffice.

> The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more there than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their esti-

> mate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search, itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. *Katz* v. *United States*, 389 U.S. 347, 356-57 (1967).

The Court of Special Appeals properly concluded that the magazines should be suppressed as the fruit of an unlawful arrest. *See Penthouse International, Ltd.* v. *McAuliffe*, 610 F.2d 1353 (5 Cir. 1980), and *State* v. *Furuyama*, 64 Haw. 109, both relied on by the Court of Special Appeals.

III.

Having Correctly Concluded That The Sole Evidence Offered To Prove A Crucial Element Of The Offense Charged—The Obscenity Of The Magazines In Question—Was Inadmissible, The Reviewing Court Properly Ordered The Charging Document Dismissed.

The Court of Special Appeals was correct in ordering that the charging document be dismissed for insufficiency of evidence, having rightly concluded that the illegally seized magazines should have been excluded. The magazines themselves were indispensable to establish the crucial element of the offense charged, the obscenity of the publications on whose sale the prosecution was predicated. With no evidence remaining on the issue of obscenity, fairness to the defendant, as well as considerations of judicial economy, required dismissal rather than remand. *Burks* v. *United States*, 437 U.S. 1 (1978).

In *Burks*, this court held that when an appellate court determines that the evidence presented at trial is legally insufficient to sustain a conviction, which is tantamount to a finding that the trial court erred in failing to grant a judgment of acquittal, it must dismiss the charging document rather than remand.

Petitioner argues that the *Burks* rule should not be applied to permit a reviewing court to assess the sufficiency of the remaining evidence after ruling that evidence essential to the state's case below should have been excluded. This question was left open as to the federal courts in *Greene* v. *Massey*, 437 U.S. 19 (1978), decided the same day as *Burks*. Maryland's position (Brief for Petitioner, pp. 43-50) is that in such situation the reviewing court must *always* remand in order to allow the prosecution an opportunity to present other evidence it may have available. This argument ignores the core value of the Double Jeopardy clause:

> The Double Jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' " 437 U.S. at 11, citations omitted.

The prosecution is entitled to one, but only one, full and fair opportunity to offer whatever proof it can assemble. *Burks*, 437 U.S. at 16. In deciding what evidence to present at any trial, the prosecution risks a determination that its proof does not meet the reasonable doubt standard. Whether that determination is made by the trial

court, by the jury or by a reviewing court is irrelevant to the defendant's entitlement to judgment of acquittal. *Burks*.

Considerations of fundamental fairness as well as double jeopardy mandate that an appellate court retain flexibility in fashioning just relief when it finds that a conviction rested in large part—or, as here, entirely—on inadmissible evidence. The rigid position urged by petitioner would subject defendants to the needless expense, anxiety and public disgrace that further jeopardy entails and would further encumber an already overburdened judicial system. In *Burks* this Court assessed the authority of the federal courts of appeal under 28 U.S. § 2106. Principles of federalism demand that even greater deference be accorded to a state appellate court's determination of its own remedial power.

Respectfully submitted,

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